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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

Docket No. 73-838

GEORGE F. KUGLER, JR.,
Attorney General of the State of New Jersey,
Petitioner,

—v.—

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, New Jersey Branch of Women's International League for Peace and Freedom, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,
Respondents.

BRIEF IN OPPOSITION

NADINE TAUB
175 University Avenue
Newark, New Jersey 07102

JANICE GOODMAN
BELLANY, BLANK, GOODMAN, KELLY,
ROSS & STANLEY
36 West 44th Street
New York, New York 10036

Attorneys for Respondents

Of Counsel:

PETER BUCHSBAUM
American Civil Liberties Union
of New Jersey
45 Academy Street
Newark, New Jersey 07102

INDEX

PAGE

Jurisdiction 1

Questions Presented 2

Statement of Facts 4

Procedural History 3

Statement of Facts 4

ARGUMENT:

I. There has been no showing of such imperative public importance as to justify deviation from normal appellate processes pursuant to Supreme Court Rule 20 7

II. The Court below properly exercised jurisdiction 8

A. Standing and Justiciable Controversy 8

B. Comity and Abstention 12

CONCLUSION 14

APPENDIX:

Complaint 1a

Report of the Prosecutors' Committee Concerning the Validity and Enforceability of 2A:87-1 ..... 18a

Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, *Y.W.C.A.* v. *Kugler,* Civ. No. 264-70 and Civ. No. 431-70, April 7, 1972, pages 25-31 .... 21a

PAGE

Letter Brief of Assistant Prosecutor Archibald Kreiger 27a

Letter of Attorney General William F. Hyland to the United States Court of Appeals for the Third Circuit 29a

TABLE OF AUTHORITIES

Cases:

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 13

Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Ex Parte Quinn, 317 U.S. 1 (1942) 8

Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935) 8

Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) 8

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

State v. Haren, 124 N.J. 475, 307 A.2d 644 (Law Div. 1973) 13

State v. Josephs, 79 N.J. Super. 411, 191 A.2d 775 (App. Div. 1963) 6

State v. Slough (Camden Cty. Ind. Nos. 447-65–448-65) 5, 10, 11

United States v. Bankers' Trust Co., 294 U.S. 240 (1935) 8

United States v. United Mine Workers, 330 U.S. 258 (1947) 8

PAGE

Youngstown Co. v. Sawyer, 343 U.S. 579 (1952) 8
Y.W.C.A. et al. v. Kugler, 342 F. Supp. 1048; Docket No. 73-1837 (3 Cir. U.S. Ct. of Appeals) 3, 9

Zwickler v. Koota, 389 U.S. 241 (1967) 13

Constitutional Provisions:

United States Constitution
First Amendment 12, 13
Fourteenth Amendment 13

Federal Statute:

28 U.S.C. §1253 7

State Statutes:

N.J.S.A. 2A:87-1 ..... 1, 5, 6, 10, 11, 12, 13
N.J.S.A. 52:17B-101 et seq. 6
N.J.S.A. 52:17B-109 ..... 6, 11

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Respondents.

BRIEF IN OPPOSITION

Jurisdiction

Respondents submit that jurisdiction pursuant to Supreme Court Rule 20 is not warranted in this case. On July 27, 1973, a three-judge district court for the District of New Jersey entered a judgment declaring New Jersey's criminal abortion statute, N.J.S.A. 2A:87-1, void on its face. Petitioner herein then simultaneously appealed to the United States Court of Appeals for the Third Circuit and petitioned this Court for a writ of certiorari pursuant to Supreme Court Rule 20. Petitioner's appeal to the Third Circuit has now been argued and is awaiting decision.

No special considerations now warrant deviation from the normal appellate process in this case. Plaintiffs-respondents' Notice of Appeal to this Court from the denial of injunctive relief below has been dismissed by order of the district court dated January 9, 1974. Hence, the only matter now before this Court is the petition of defendant Kugler which raises precisely those issues now awaiting resolution in the United States Court of Appeals of the Third Circuit.

Questions Presented

I. Does a judgment of a three-judge district court declaring New Jersey's criminal abortion statute unconstitutional entered after this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* present a matter of such imperative public importance as to justify deviation from normal appellate process and to require settlement in this Court?

II. In light of this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton,* did not the court below properly exercise jurisdiction where all doctor plaintiffs alleged interference with their ability to practice their profession according to the highest medical standards, two doctors had been prosecuted and lost their licenses to practice, and none was subject to a pending state prosecution?

Statement of the Case

Procedural History

In order to clarify the present status of the case and to emphasize that this matter does not involve review of an order of the Court of Appeals for the Third Circuit, plaintiffs-respondents set forth a simplified and updated chronology of the proceedings in this matter.

On March 5, 1970, plaintiffs—doctors, women and women's organizations—filed their complaint seeking to have New Jersey's medical licensing statute declared unconstitutional and enjoined. In an opinion dated February 29, 1972, the three-judge district court found that the doctor plaintiffs had standing and declared the challenged statutes unconstitutional, while at the same time denying injunctive relief. The order was entered on April 12, 1972. Defendant Kugler then appealed this judgment to the Court of Appeals for the Third Circuit. While this appeal was pending, the Supreme Court decided *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973), and on March 2, 1973, the Court of Appeals vacated the judgment and remanded the cause for reconsideration. After reconsideration the three-judge district court refiled its original decision and order on July 27, 1973.

From this final order of the three-judge district court, defendant filed a notice of appeal to the Court of Appeals, which appeal he is now pursuing *sub nom. Y.W.C.A. et al.* v. *Kugler*, Docket No. 73-1837. The Third Circuit heard oral argument in the proceeding on February 11, 1974, and the matter is now under advisement.

In addition, plaintiffs filed a notice of appeal to this Court from the July 27, 1973 judgment of the three-judge district court denying an injunction. Prior to the filing of plaintiffs' jurisdictional statement in this Court, defendant filed a petition for certiorari pursuant to Supreme Court Rule 20, providing for review of cases before judgment by a court of appeals only upon a showing of imperative public importance. Subsequently, plaintiffs determined not to pursue their appeal to the Supreme Court, and when they were unable to obtain defendant's consent to the dismissal of their notice of appeal, they proceeded by motion to obtain the dismissal. On January 9, 1974, the district court dismissed plaintiffs' appeal only, leaving defendant's petition still pending. (A true copy of the district court's order dismissing that appeal has already been forwarded to this Court.)

In short, at this time the same matter is pending in the Third Circuit and in this Court, and consequently plaintiffs are simultaneously appellees before the Third Circuit and respondents before this Court.

Statement of Facts

In his petition for certiorari, petitioner asserts that "since 1967, New Jersey has not made it difficult for the physician to decide the best course of professional practice in relation to a plaintiff's pregnancy." (Petition at 7.) This is simply not the case.

At the time this suit was initiated, as a result of past prosecutions and specific threats, plaintiff doctors were uncertain as to their rights and were therefore forced to turn

away patients seeking advice and information about the possibility of obtaining abortions. Dr. Breslow in particular alleged that he had stopped performing abortions after being advised of local prosecutorial policy. Further, two of the plaintiffs had lost their licenses to practice as a result of prosecutions and one was still incarcerated at the time of filing. However, no plaintiff was subject to a pending state prosecution. (See Verified Complaint, Paras. 4, 11, 12; Resp. App. at 2a-7a; 10a-11a; Opinion below at 6a of Pet. App.)

Since that time, two New Jersey physicians, Dr. Robert Livingston and Dr. Bernard Greenspan, were indicted for performing an abortion, conspiracy to perform an abortion, and aiding and abetting in the performance of an abortion. (Bergen County Indictment Nos. S-1548-72 and S-1549-72; see Petition at 7.) Significantly, these indictments, dated August 24, 1972, were returned after entry of the three-judge court's order and after counsel for defendant, in opposing plaintiffs' plea for injunctive relief, had specifically assured the district court that the State had no intention of prosecuting any doctors for performing abortions. (See Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, pages 25-31, Resp. App. at .) Moreover, the State of New Jersey has opposed and continues to oppose the post-conviction relief application of an incarcerated physician's assistant convicted under N.J. S.A. 2A:87-1, New Jersey's criminal abortion statute. (See Letter brief of Assistant Prosecutor Archibald Krieger re *State* v. *Slough*, Resp. App. at 27a.)

It is true that at various times state officials have issued different policy statements regarding the criminal abortion statute. In 1967 the county prosecutors issued a

policy statement which was in effect at the time plaintiff Breslow was deterred from continuing to perform abortions. The same policy was in effect at the time Drs. Livingston and Greenspan were indicted. Subsequent to this Court's ruling in *Roe* and *Doe*, former Attorney General Kugler issued a press release asserting that N.J.S.A. 2A:87-1, the criminal abortion statute, had continuing validity, stating that he would direct the prosecutions of laypersons under it, and suggesting that certain doctors would also be subject to prosecution. (Pet. App. at 64a-77a.)

In January, 1974, William F. Hyland succeeded George F. Kugler, Jr. as Attorney General of the State of New Jersey. Prior to oral argument in the Third Circuit on February 11, 1974, the new attorney general had issued no statement of policy with regard to the enforcement of the challenged statutes. On February 15, 1974 in a letter submitted to the Third Circuit in response to request of the Court at oral argument, Attorney General Hyland indicated his view that N.J.S.A. 2A:87-1, as interpreted by his office, has continuing validity. (Letter of Attorney General Hyland, Resp. App. at 29a.) His letter does not state doctors will not be prosecuted. Nor does it indicate that he or any future attorney general is bound to follow the position there enunciated. Finally, the letter fails to mention any directive—binding or otherwise—to the county prosecutors throughout New Jersey who, in the absence of any affirmative action by the Attorney General, have complete autonomy. N.J.S.A. 52:17B-101 *et seq.*, especially, N.J.S.A. 17B-109; *State* v. *Josephs*, 79 N.J. Super. 411, 191 A.2d 775 (App. Div. 1963). Thus there is no current statement of prosecutorial policy which assures doctors that they are not subject to prosecution.

ARGUMENT

I.

There has been no showing of such imperative public importance as to justify deviation from normal appellate processes pursuant to Supreme Court Rule 20.

Rather than waiting for the decision of the United States Court of Appeals and then requesting review, petitioner now seeks review prior to entry of judgment by the Third Circuit in accordance with Supreme Court Rule 20. However that rule requires a showing of imperative public importance which has not been made here.

At issue is a judgment of a three-judge district court declaring a criminal abortion statute of the Texas type unconstitutional.* The propriety of such a ruling was clearly settled by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and a request at this time for reconsideration of that decision does not present an issue of imperative public importance. Nor is there any other aspect of the case currently before the Court with which the review sought by petitioner could be combined so as to promote prompt settlement of all issues. Unlike *Roe* v. *Wade, supra,* the instant case does not involve a direct appeal by the plaintiff to the Supreme Court from the denial of an injunction pursuant to 28 U.S.C. §1253, and thus the petition must be considered alone.

Following the decisions in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the case at bar cannot be said to present any questions of imperative public im-

* New Jersey's statute was explicitly counted among those of the Texas type by this Court in its opinion. *Roe* v. *Wade*, 410 U.S. 118, n. 2.

portance. No significant issue of national impact is raised either with regard to the economy of the entire country, the powers of government or foreign relations. Compare *United States* v. *Bankers' Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). Instead, if the points here raised are of any interest at all, they are of purely local concern. Hence the exercise of special jurisdiction permitted under Rule 20 is not merited in this case.

II.

The Court below properly exercised jurisdiction.

After this Court's decisions in *Roe* and *Doe*, petitioner is unable to raise any objections going to the merits of the ruling below, and he instead relies on several non-substantive points. These too are without merit, particularly in light of *Roe* and *Doe*.

A. *Standing and Justiciable Controversy*

After this Court's decision on *Doe* v. *Bolton*, *supra*, there can be no question that the doctor plaintiffs had standing to initiate this action. In *Doe*, the Court concluded that:

> [T]he physician-appellants who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with pros-

ecution, for violation of the State's abortion statutes. 410 U.S. at 188.

This holding goes well beyond that necessary to establish standing in the instant case since here two doctor plaintiffs had actually been prosecuted and one had been threatened with prosecution under New Jersey's criminal abortion statute.

Nor have these plaintiffs been deprived of standing by *ad hoc* policy statements of any state officials. Indeed, the initial statement of prosecutorial policy, i.e., the county prosecutors' guidelines issued in 1967, failed to prevent either the threat of prosecution to one plaintiff or the actual indictment of two physicians in 1972.

The subsequent press release of Attorney General Kugler in 1973 similarly failed to deprive plaintiff doctors of standing—not the least because constitutional rights cannot be made to depend on a mere press release. That press release, which purported to reinterpret the New Jersey abortion law so as to render it consistent with *Roe* and *Doe*, contained no concession whatsoever that the New Jersey law is unconstitutional as applied to doctors. Nor did it contain any statement that there shall be *no* prosecutions of doctors. Neither did it contain any acknowledgment that, as the court below found, that portion of the New Jersey law which proscribes advising or directing a woman in obtaining an abortion constitutes an unconstitutional restraint on free speech. *Y.W.C.A.* v. *Kugler*, 342 F. Supp. 1048, 1063. Nor, lastly, in asserting that the law was enforceable against laypersons, did the press release indicate in any way that laypersons who assist doctors in performing abortions and laypersons who engage in counseling and referral to doctors would be

protected from prosecution. Thus, even though the new statutory interpretation put forward by Attorney General Kugler in his press release totally rewrote the New Jersey statute, it did not do away with the statute's interference with the physician's right to practice.

Furthermore, despite petitioner's assertions, it is clear that the 1973 Kugler press release did not bind local county prosecutors so as to provide a uniform interpretation of the law which is consistent with this Court's decisions in *Roe* and *Doe*. This is evidenced by the position taken by the Camden County Prosecutor while the 1973 policy was in effect in opposing the granting of post-conviction relief to a physician's assistant convicted under N.J.S.A. 2A:87-1. The local prosecutor's opposition was based on the grounds that one who assists a licensed physician is immune from prosecution only if that person is a registered nurse or a licensed practical nurse. (Letter of Assistant Prosecutor Archibald Krieger, re *State* v. *Slough,* Resp. App. at 27a.)

Moreover, former Attorney General Kugler obviously lacked the capacity to bind a new attorney general simply by issuing a press release. Thus when the new attorney general, William F. Hyland, took office in January, 1974, plaintiff doctors were left without any assurance whatsoever that they were free to practice without fear of prosecution under N.J.S.A. 2A:87-1. Nor did the letter recently submitted by Attorney General Hyland to the United States Court of Appeals provide sufficient assurance to deprive plaintiff doctors of standing.* That letter

* It should be noted that prior to the Third Circuit's request the new Attorney General had not issued any statement of policy on his own initiative.

is merely a statement of the interpretation of N.J.S.A. 2A:87-1 now current in the office of the Attorney General, giving no indication as to that office's policy with respect to prosecutions.

Like doctors in Texas, doctors in New Jersey are "placed in the posture of dependence on prosecutorial policy or prosecutorial discretion." *Roe* v. *Wade, supra,* at 208, concurring opinion of Chief Justice Burger. The letter of Attorney General Hyland is an unsworn statement which does not purport to bind either the present attorney general, or any future attorney general or any present or future county prosecutor. Inasmuch as the Attorney General does not—and probably cannot—bind himself or his successors, doctors have no assurance that they will not be prosecuted should this or another attorney general adopt a different view of the law. In addition, without any affirmative action on the part of the attorney general, county prosecutors retain complete autonomy, N.J.S.A. 52:17B-109, and thus continue to be free to enforce the abortion statutes as they see fit.* Furthermore, an unsworn statement of an attorney general does little to dispel uncertainty among the doctors of New Jersey as to their rights, particularly in view of the recent indictment of two New Jersey doctors only shortly after a deputy attorney general represented to the three-judge district court that the State had no intention of prosecuting doctors. (See Transcript of Hearing on Motion to Enter Judgment, pp. 25-31, Resp. App. at 21a.)

Nor does the substantive position adopted by the new Attorney General end the controversy by resolving all the

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* See the discussion *supra* of Letter of Archibald Krieger regarding *State* v. *Slough*.

constitutional infirmities of the New Jersey abortion statute. The statutory interpretation adopted by Attorney General Hyland has essentially the same failings as that adopted by Attorney General Kugler. Like the old Attorney General, the new Attorney General attempts to rewrite the statute totally. Nonetheless, it is apparent that laypersons performing the functions of counseling and referring patients to doctors will still be subject to prosecution in clear violation of the First Amendment. Hence, the ability of doctors to practice their profession is affected by the statute even as reconstrued.

In sum, the doctor plaintiffs herein had standing and presented a justiciable controversy at the time this case was initiated. And nothing has occurred since that time to deprive them of standing or to resolve that controversy.

B. *Comity and Abstention*

Petitioner now urges, four years after the commencement of this suit, that the three-judge district court should have declined to exercise jurisdiction as a "gesture of comity" and as a matter of equitable abstention. These arguments, particularly coming at this late date, totally lack merit.

Petitioner's comity argument is based on the theory that the New Jersey courts stand ready, willing and able to render N.J.S.A. 2A:87-1 constitutional by construing it anew. Yet after the *Roe* and *Doe* decisions, the states were left with a wide range of possible legislation which they could—but did not need to—enact. Reconstruction of a statute in a situation of this complexity must be left to the legislature.

> [A]n attempt to "construe" the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty. *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515 (1964).

Further, contrary to petitioner's contentions, the holding of the lower state court in *State* v. *Haren,* 124 N.J. 475, 307 A.2d 644 (Law Div. 1973) that laypersons have no standing to challenge the constitutionality of the abortion statute indicates that, to say the least, there will be difficulties in obtaining a definitive ruling on N.J.S.A. 2A:87-1 in the New Jersey courts.

But most important, where, as here, fundamental rights under the First and Fourteenth Amendments are at stake the federal courts are under an obligation to respect the plaintiffs' choice of forum. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). Moreover, it is manifest that, at this late date, "to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings [will] itself effect the impermissible chilling of the very constitutional rights he seeks to protect." *Ibid.* at 252.

Nor does petitioner's equitable abstention argument stand up after this court's decisions in *Roe* and *Doe.* By distinguishing between the situation presented by the Texas doctor who was subject to a pending state prosecution and the Georgia doctor who was not and by upholding

challenges to the abortion laws of both states, the Court made clear that abstention was inappropriate in cases of this sort. Like the Georgia physician, the plaintiff doctors in the instant case are not subject to pending state prosecutions, and thus they clearly present a case where federal review is warranted.

CONCLUSION

For all the foregoing reasons, respondents respectfully pray that the writ of certiorari to review the decision to the United States District Court for the District of New Jersey sought in this matter be denied.

Respectfully submitted,

NADINE TAUB
175 University Avenue
Newark, New Jersey 07102

JANICE GOODMAN
BELLANY, BLANK, GOODMAN, KELLY,
ROSS & STANLEY
36 West 44th Street
New York, New York 10036

Attorneys for Respondents

Of Counsel:

PETER BUCHSBAUM
American Civil Liberties Union
of New Jersey
45 Academy Street
Newark, New Jersey 07102

APPENDIX

Complaint

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 264-70

Young Women's Christian Association of Princeton, New Jersey, Ann Krasnoff, New Jersey Branch of Women's International League for Peace and Freedom, Anne Ivey, Marilyn Ressler, Esther S. Frankel, Michael A. Tricarico, M.D., Myra R. Zinke, M.D., Samuel Breslow, M.D., Jack L. Ward, M.D., Ellis J. Mischel, M.D., Sherwin H. Raymond, M.D., and Ralph Dean Cavalli, M.D.,

Plaintiffs,

—vs.—

George F. Kugler, Jr., Attorney General of the State of New Jersey,

Defendant.

I. Jurisdiction

1. This is an action to redress the deprivation, under color of state law, of rights guaranteed to the plaintiffs by the Constitution and of the United States, specifically the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution. The jurisdiction of the Court arises under 28 U.S.C. 1331, 1343, 2201, 2202, 2281, and 2284, and 42 U.S.C. 1983.

2. Plaintiffs seek a declaration that the New Jersey statutes prohibiting the performance of abortions and pun-

ishing doctors, and thereby women, for conduct involving abortion, N.J.S. 2A:87-1, N.J.S. 45:9-16, are unconstitutional, and an injunction against the continued enforcement of said statutes. This is a proper case for the convening of a three judge federal court under 28 U.S.C. 2281, 2284.

II. Parties

3. The plaintiffs in this action are women and doctors of the State of New Jersey interested in the welfare and freedom of New Jersey citizens, personally, directly and adversely affected by the deprivation of rights caused by the present status of New Jersey's scheme of abortion regulations. The doctors and women are intimately affected by the New Jersey abortion statutes. Plaintiffs seek to make real their rights to freely associate with doctors and patients of their choice, to realistically cope with problems of the utmost privacy made grotesquely public by New Jersey's statutes, to live their lives under laws rational in their scope and effect, and to maintain the health and well being of themselves and their families.

4. Each of the doctors described below is a resident of the State of New Jersey, and a citizen of the United States. Each is hindered, deterred, chilled, threatened, and adversely affected by the actual or threatened enforcement of the above mentioned statutes, thereby preventing the full and complete exercise of rights guaranteed by the Constitution:

a. Plaintiff Michael A. Tricarico, whose home address is Box 377, Rocky Hill, New Jersey, was licensed to practice medicine in New Jersey in 1967. His offices are at 66 Mt. Lucas Road, Princeton, New Jersey. He is a member of the American Medical Association, the

Child Guidance Clinics of the United States, and the American Psychiatric Association. He teaches psychology at Trenton State College. During the course of his practice as a child and adolescent psychiatrist he turns away about two to four women per month who ask for and are in need of abortions because of their tender age, or depressed or psychotic state of mind. Because of the present structure of New Jersey's abortion regulation, Dr. Tricarico is unable to provide the medical help these women need.

b. Plaintiff Myra R. Zinke, whose home address is Box 367, Holmdel Road, Holmdel, New Jersey, was licensed to practice medicine in New Jersey in 1953. Her offices are in her home. She is a member of the American Society of Internal Medicine and the American Medical Women's Association. She teaches as an Assistant Clinical Professor at New Jersey College of Medicine. She is a fellow of the American College of Physicians. During the course of her practice in internal medicine she turns away about two to three women per year who ask for and are in need of abortions because of their lack of husbands. Because of the present structure of New Jersey's abortion regulation, Dr. Zinke is unable to provide the medical help these women need.

c. Plaintiff Samuel Breslow resides at 76 Market Street, Perth Amboy, New Jersey. He was licensed to practice medicine in New Jersey in 1932. His offices are at 511 New Brunswick Avenue, Perth Amboy, New Jersey. He is a member of the medical staff, Perth Amboy General Hospital. He is presently an attending

physician there as well as the physician in charge of the out-patient clinics. He was the director of the department of obstetrics and gynecology 1961-63.

He served as president of Perth Amboy General Hospital's medical staff for the years 1966 through 1968. He had also been the medical staff's treasurer and vice president, and a member of its joint conference and planning and development committee.

He is now a member of the Middlesex County Mental Health Advisory Committee and the Paramedical Education Advisory Committee of Middlesex County Community College.

Dr. Breslow is a well-known speaker on current changes in health care. In 1968 he appeared before the United States Senate Committee on Small Business, headed by Senator Gaylord Nelson, to testify concerning multiphasic screening. He also appeared before the New Jersey Legislature's joint Senate-Assembly Committee hearing on Family Planning, and before the New Jersey Commission on Reform of the Abortion Law. He is a member of the State Medicaid Committee on Family Planning, and is Chairman of the Community Services, Middlesex County Medical Society. He is a member of the International College of Surgeons, the Royal Society for Health, London, England, the American College of Obstetrics and Gynecology, the American College of Surgeons, the American College of Abdominal Surgeons, the American Medical Association, the New Jersey Medical Society, the New Jersey State Obstetrical and Gynecological Society, the Middlesex County Medical Society, the New York Academy of Science, and the Raritan Bay Academy of Medicine (Past President). He is also a contributor to the Journal of

Obstetrics and Gynecology and Modern Medicine. He is a member of the American Legion, BPOE, Elks, and Congregation Beth Mordecai, Perth Amboy.

During the course of his practice of obstetrics and gynecology, he turns away about ten to thirty women per month who ask for and are in need of abortions. Because of the present structure of New Jersey's abortion regulation, Dr. Breslow is unable to provide the medical help these women need.

d. Plaintiff Jack L. Ward, resides at 2631 Pennington Road, Pennington, New Jersey. He was licensed to practice medicine in New Jersey in 1957. His offices are at 435 Bellevue Avenue, Trenton, New Jersey. He is a member of the Mercer County Component Medical Society, the New Jersey Medical Society, the American Medical Association, the New Jersey Neuro-Psychiatric Association, the American Society of Group Psychotherapy and Psychodrama. He is a fellow and Past President of the American Society of Group Psychotherapy and Psychodrama. During the course of his psychiatric practice he turns away about ten persons per year who ask for and are in need of abortions because of their already large families or their highly depressed state of mind. Because of the present state of the New Jersey abortion regulation scheme, Dr. Ward is unable to provide the medical help these women need.

e. Plaintiff Jane N. Spragg resides at 234 Dudley Avenue, Westfield, New Jersey. She was licensed to practice medicine in New Jersey in 1953. She is a member of Planned Parenthood Physicians, American Association of Sex Educators and Counselors, New Jersey Public Health Association, Westfield Medical Society, and the New Jersey

Committee on Abortion. During the course of her practice in a planned parenthood clinic, she turns away about twelve persons per month who ask for and are in need of abortions because of a desire to limit the size of their families. Because of the present structure of New Jersey's abortion regulation scheme, Dr. Spragg is unable to provide the medical help these women need.

f. Plaintiff David M. Atkin resides at 153 Parkside Drive, Princeton, New Jersey. He was licensed to practice medicine in New Jersey in 1964. He is a member of the American Academy of Pediatrics, was a Diplomate to the American Board of Pediatrics in 1965 and is an Instructor of Pediatrics at Columbia-Presbyterian Hospital. He has published articles in the Journal of the Academy of Pediatrics. During the course of his practice in pediatrics he turns away two to three persons per year who ask for and are in need of abortions because of their unmarried state. Because of the present New Jersey abortion laws, Dr. Atkin is unable to provide these persons with the medical help they need.

g. Plaintiff Ellis J. Mischel resides at 181 Summit Avenue, Summit, New Jersey. He was licensed to practice medicine in New Jersey in 1955. He is a member of the American Academy of Psychoanalysis, and he has published articles in the Journal of the American Psychiatric Association on group therapy. He is a Diplomate of the American Board of Psychiatry and a fellow of the American Psychiatric Association. During the course of his practice in psychiatry, he turns away about two to three persons per month who ask for and are in need of abortions because they are unmarried. Because of the present struc-

ture of New Jersey's abortion laws. He is unable to provide the medical help these patients need.

h. Plaintiff Sherwin H. Raymond resides in Ridgefield, New Jersey. He was licensed to practice medicine in New Jersey in 1956. He was in the U. S. Army Medical Corps in 1951-1953. He has been on the medical staff of Holy Name Hospital in Teaneck, New Jersey, St. Mary's Hospital in Hoboken, New Jersey, North Hudson Hospital, Weehawken, New Jersey, and Margaret Hague Hospital, Jersey City, New Jersey. He has held membership in the American Medical Association, and the Bergen County Medical Society, has been a Diplomate of the National Board of Medical Examiners and a member of the American Society of Abdominal Surgeons. He has been arrested several times and charged with violations of N.J.S.A. 2A: 87-1, and has been convicted of violating said statute. Dr. Raymond's license to practice medicine in New Jersey has been revoked under N.J.S.A. 45:9-16.

i. Plaintiff Ralph Dean Cavalli resides at 207 Broadway, Camden, New Jersey. He was licensed to practice medicine in New Jersey in 1940. He has held membership in the American Medical Association, the New Jersey Medical Society, and the Camden Medical Society. He has been arrested several times for violating N.J.S. 2A:87-1 and is now in the custody of the Department of Institutions and Agencies of the State of New Jersey because of a conviction under said statute. His license to practice medicine has been revoked under N.J.S. 45:9-16.

5. Plaintiffs Anne Ivey, who resides at 10 Birchwood Court, Princeton Junction, New Jersey, Marilyn Ressler, who resides at Grandview Road, Skillman, New Jersey,

and Esther S. Frankel, who resides at 455 East 42nd Street, Paterson, New Jersey, sue on their own behalves and on the behalf of the membership of the New Jersey Branch of the Women's International League for Peace and Freedom, an unincorporated association of New Jersey women. Anne Ivey is President, Marilyn Ressler is Treasurer, and Esther S. Frankel is Secretary, of the Women's International League for Peace and Freedom of New Jersey. The New Jersey section of the International League is part of an international organization of the same name founded by Jane Addams in 1915 to seek peace and freedom for all people of the world. As part of their program the U. S. section of the Women's International League for Peace and Freedom believes that American women have the right to decide whether or not they will bear children; and that abortion is a medical and not a legal matter. The New Jersey affiliate to the International League has specifically urged the repeal of New Jersey's abortion laws and is now pursuing this case in its continuing effort to make real the medical and civil freedoms guaranteed to all by the Constitution.

6. Plaintiff Ann Krasnoff sues on behalf of herself and on behalf of the Young Women's Christian Association of Princeton, New Jersey, on whose Board she sits. The Young Women's Christian Association of Princeton has a diverse membership of women concerned about the rights of women in American society. The membership has been active in its opposition to New Jersey's abortion laws, and has been vocal in its desire to allow abortions to be medically handled in a private way between doctor and patient. The Association participates in this litigation in furtherance of its view that New Jersey abortion laws deprive

women of the fundamental right to privacy and medical care.

7. Defendant George F. Kugler, Jr., is the Attorney General of New Jersey, and is clothed with the duty of enforcing the statutes here in question.

III. Facts

8. N.J.S. 2A:87-1, provides that

> Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.
>
> If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5000, or by imprisonment for not more than 15 years, or both.

9. N.J.S. 45:9-16 provides that

> The board [New Jersey State Medical Board] may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery or chiropractic filed in the office of any county clerk in this State under any act of the legislature, upon proof to the satisfaction of the board that the holder of such license . . . (c) has practised criminal abortion, or been convicted of the crime of criminal abortion. . . . Before any license or registration, or chiropractic filed in the office of any county

> clerk of this State under any act of the Legislature, shall be suspended or revoked, except in the case of convictions of criminal abortions . . . the accused person shall be furnished with a copy of the complaint and be given a hearing before said board in person or by attorney. . . .

10. N.J.S. 2A:87-1 does not elaborate its applicability or lack of same to the common situations in which a patient seeks an abortion such as psychiatric indications, cardiac complications, kidney disease, rape, German measles, contraceptive failure, genetic complications, gastrointestinal diseases, neurologic diseases, diabetes, pulmonary diseases, cancer, exposure to radiation, and socio-economic conditions such as those encountered by parents who have neither the means nor the desire to have children.

11. Not only does N.J.S. 2A:87-1 not carefully elaborate the scope of its application, but the legal authorities of the State of New Jersey have given the statute variable interpretations over time, leading inevitably to uncertainty in the ranks of the medical profession and among the state's women. On or about June 23, 1967, then Attorney General Sills issued a press release announcing the results of a meeting of county prosecutors of the State of New Jersey which endorsed a report of a Committee on Abortion Law Study (See Appendix). The report indicated that the county prosecutors would not prosecute doctors performing abortions in which a doctor had made a good faith medical decision that an abortion was medically indicated. Prosecutor Edward J. Dolan of Middlesex County dissented from the report.

12. Prior to Edward J. Dolan's dissent from the report of the prosecutor's committee, Plaintiff Breslow and others were performing abortions in the hospitals of Middlesex County. Since notice of Edward Dolan's dissent was conveyed publicly and privately to plaintiff Breslow and others such abortions are no longer being performed by plaintiff Breslow and others in the hospitals of Middlesex County.

13. The scope and coverage of N.J.S. 2A:87-1 has been made extremely broad by the decisions of the courts of the State of New Jersey. The statute has been construed to make it a crime for anyone to advise someone where an abortion may be obtained, *State* v. *Wilson,* 79 N.J.L. 241 (1910); *State* v. *Weiss,* 130 N.J.L. 140 (1943); *State* v. *Ellrich,* 10 N.J. 146; to perform an act of abortion whether or not it is successful, *State* v. *Ellrich,* supra; *State* v. *Sutrchio,* 131 N.J.L. 256 (1944); *State* v. *Novak,* 22 N.J. 231; and to conspire to commit an abortion even though there is nothing to abort, *State* v. *Moretti,* 52 N.J. 182 (1968). The result is that the abortion itself is not the illegal act, for nothing need be aborted in order for there to be an offense. Plaintiff Raymond has been found guilty of violating N.J.S. 2A:87-1, though no one has ever proved that he has committed an abortion.

Furthermore, in *State* v. *Moretti,* supra, the Supreme Court of New Jersey, in an attempt to avoid a vagueness challenge to N.J.S. 2A:87-1 said that the phrase "maliciously or without lawful justification" may be construed to mean that the life of the mother was in danger. Said construction is not an exclusive one. The prosecutors of the state of New Jersey have not indicated that their prosecuting policy has been changed by *Moretti.* The

people of the State of New Jersey are in complete confusion.

14. Plaintiffs Tricarico, Zinke, Breslow, Ward, Spragg, Atkin, and Mischel, are asked by women in many different circumstances to perform abortions in the course of their medical practices. The plaintiffs must in each case decide whether and how he can advise and treat these patients in light of their overall physical and mental condition, and of their other personal needs. The medical problems presented to the plaintiffs have included in the past, and are likely to include in the near future:

a) Serious danger of death to the woman unless an abortion is performed;

b) Serious danger of suicide

c) Possible danger of suicide

d) Uncertain danger of suicide

e) Pregnancy caused by forceful rape, incest, statutory rape,

f) Pregnancy concurrent with diseases, including German measles, which might result in abnormal children;

g) Pregnancy when the patient would prefer to postpone childbearing until a later date, including situations involving contraceptive failure, youth of the female, poverty or other reasons.

The aforementioned plaintiffs and other doctors are not able to discern with any degree of clarity in which of the above situations they may legally perform an abortion, or

solicit others to perform an abortion. Proper medical care of their patients is effectively curtailed because of the abortion laws.

15. Plaintiffs Raymond and Cavalli have both been convicted of violating N.J.S. 2A:87-1 or conspiring to violate the same statute. Plaintiffs Raymond and Cavelli have had their licenses to practice medicine in the State of New Jersey revoked. Plaintiff Raymond's license was revoked without a hearing, confrontation of witnesses or other basic processes recognized as necessary for the conduct of an impartial proceeding.

16. A therapeutic abortion performed under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous to a woman, and many result in death, maiming, sterility, or serious infection. Experts estimate that from 300,000 to one million extra-clinical abortions are performed within the United States each year, hundreds resulting in death, thousands in serious infection. Experts further estimate that fewer than ten thousand abortions are performed within hospitals each year in the United States. The threat and uncertainty of statutory provisions such as those in New Jersey are the principal deterrent to physicians and patients who desire to perform or have clinical abortions. The plaintiffs as doctors or as women are unable to pursue normal medical practices because of the uncertainty, sweep, and application of the challenged statutes.

IV. Cause of Action

17. N.J.S. 2A:87-1 is unconstitutionally vague and uncertain on its face and as construed in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution.

18. N.J.S. 2A:87-1 and 45:9-16 on their face and as applied, deprive doctor-plaintiffs and their patients of the right to privacy in their physician-patient relationships, as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

19. Said statutes, on their face and as applied, deprive doctor-plaintiffs of the right to practice medicine according to the highest standards of medical practice, as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

20. Said statutes, on their face and as applied, deprive female plaintiffs and other women of "[t]he fundamental right of [a] woman to choose whether to bear children . . . " *People* v. *Belous,* 458 P. 2d 194, 80 Cal. Rep. 354 (1969) as protected by the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

21. Said statutes, as applied and on their face, infringe upon female plaintiffs and other women's right to life [which] is involved because childbirth involves risks of death," *People* v. *Belous,* supra, in violation of the Fourteenth Amendment to the United States Constitution.

22. Said statutes, on their face and as applied, infringe upon female plaintiffs and other women's rights to safe and adequate medical advice and treatment pertaining to the

decision of whether to carry a given pregnancy to term, in violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

23. Said statutes, on their face and as applied, infringe upon the stated constitutional rights of all of the plaintiffs because said rights are protected and fundamental, and no compelling or overriding justification can be offered for the potentially drastic sweep of the statutes.

24. Said statutes, on their face, and as applied, deprive all of the plaintiffs of the equal protection of the laws, by treating similarly situated classes differently with no compelling justification for classification.

25. Said statutes, on their face and as applied, violate the First Amendment free speech guarantee in their broad and indiscriminate sweep which deters and chills discussion and advice pertaining to abortion, and the Fourteenth Amendment in their broad and indiscriminate sweep which is unrelated to any legitimate state medical or regulatory needs.

26. Said statutes violate the Eighth Amendment in that they operate to impose a cruel and unusual punishment upon women by forcing them to bear each child they conceive.

27. The implementation of said statutes places the physician in a position of decision-making beset with such inherent possibility of bias and conflict of interest as to deprive all of the plaintiffs of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

28. N.J.S. 45:9-16 deprives Plaintiffs Raymond and Cavalli of rights guaranteed to them by the Fourteenth Amendment to the United States Constitution in that said statute

a) Causes the revocation of medical licenses without rights to a hearing and other basic rights guaranteed by the due process clause;

b) Mandates the revocation of a medical license on the basis of an unconstitutional statute, thereby depriving plaintiffs of their rights to practice medicine with the highest regard for the health of their patients.

c) Mandates the revocation of a medical license on the basis of a statute which is unconstitutional for the reasons stated in paragraphs 17 to 27.

IV. Relief

29. Plaintiffs request that a three judge court be convened immediately to hear this case.

30. Plaintiffs request that a declaratory judgment be issued holding that N.J.S. 2A:87-1 and N.J.S. 45:9-16 are unconstitutional.

31. Plaintiffs request that an injunction issue against the enforcement of N.J.S. 2A:87-1 and N.J.S. 45:9-16 against any of the plaintiffs in this action.

32. Plaintiffs Raymond and Cavalli request an order expunging their criminal records resulting from convictions under the above statute, and an order requiring the

return of their licenses to practice medicine in the State of New Jersey.

Respectfully submitted,

ROY LUCAS, Esq.
The James Madison Constitutional Law Institute
26 W. 9th Street
New York, N. Y. 10011
(212) 475-0590

RICHARD CHUSED, Esq.
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

RICHARD I. SAMUEL, Esq.
534 E. Broad Street
Westfield, New Jersey 07090

RUTH RUSSELL GRAY, Esq.
517 Central Avenue
Plainfield, New Jersey 07060

FLORENCE PESKOE, Esq.
Rutgers University, School of Law
180 University Avenue
Newark, New Jersey 07102

STEPHEN M. NAGLER, Esq.
of the New York Bar
American Civil Liberties Union of New Jersey
45 Academy Street
Newark, New Jersey 07102

Of Counsel:

ELEANOR HOLMES NORTON, Esq.
of the New York Bar
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

APPENDIX

Report of the Prosecutors' Committee Concerning the Validity and Enforceability of 2A:87-1 (Abortion Law)

The committee was composed of the following: Brendan Byrne, Prosecutor, Essex County, Chairman; Robert Frederick, Prosecutor, Warren County; Joseph Hoffman, Assistant Attorney General in charge of criminal investigations; Leo Kaplowitz, Prosecutor, Union County; Frank Scerbo, Prosecutor, Morris County.

The report of the aforementioned committee is as follows: it is not the function of this committee to make a judgment as to the morality of abortions or the termination of a pregnancy. It is the purpose of the Prosecutor to enforce the criminal laws of the State of New Jersey as enacted by the Legislature. And in serving this function it becomes necessary for the Prosecutor to interpret the criminal laws in accordance with the language used by the Legislature and the applications made with respect thereto by decisional law. In the first instance we deem it to be the obligation of a Prosecutor to uphold a law enacted by the Legislature unless that law has previously been declared invalid by a court of competent jurisdiction.

Premised upon the aforegoing, it is our opinion that N.J.S. 2A:87-1 which makes it a high misdemeanor for any person who "maliciously or without lawful justification" causes or procures the miscarriage of a pregnant woman is constitutional. This statute has never been ruled unconstitutional by the State courts which have considered it on at least two separate occasions, *Gleitman* v. *Cosgrove*, 49 N.J. 22 (1967); *State* v. *Brandenburg*, 137 N.J.L. 124 (S. Ct. 1948). It is therefore clear that the presumption of

constitutionality attaches to the statute, *Fried* v. *Kerrick*, 34 N.J. 68, 74 (1961); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N.J. 199 (1960); *In re Loch Arbour*, 25 N.J. 258, 264 (1957), and its presumed validity must be accepted by each and every law enforcement authority.

It is the considered opinion of this committee that the salient legal question presented by this statute is whether the words "without lawful justification" are capable of judicial definition within the framework of the cited statute.

The courts of this State have in the past been able to apply a given set of facts to this particular terminology. The committee points to the cases of *State* v. *Shapiro*, 87 N.J.L. 319 (E. & A. 1916), *State* v. *Brandenburg*, 137 N.J.L. 124 (S. Ct. 1948), and the recent case of *Gleitman* v. *Cosgrove*, 49 N.J. 22 (1967). While the committee has not explored in depth other variations of the usage of similar language in other statutes it points to the following cases as being illustrative of the ability of the court to define the terminology used in the cited statute. *Cf. State* v. *Hudson County News Co.*, 35 N.J. 284 (1961), *Grove Press Inc.* v. *Calissi*, 208 F. Supp. 580 (U.S.D.C. 1962), *Sanitary Vendors, Inc.* v. *Byrne*, 40 N.J. 157 (1963); and also see N.J.S. 2A:115-2, N.J.S.A. 18:13-11.

The aforementioned cited cases of *Shapiro*, *Brandenburg*, and *Gleitman* are illustrative of the ability of a court to define the words "without lawful justification" and, in the aforementioned cases of Shapiro and Brandenburg, the respective courts held to be "lawful justification" where the end result was the preservation of the mother's life. Additionally, in the recent Gleitman case, Justice Proctor had the following to say with respect thereto:

> "It may well be that when a physician performs an abortion because of a good faith determination in ac-

cordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime." See § 207.11 *Model Penal Code,* comment 4, 153-154 (*Tent. Draft No. 9* 1959), and *cf. Sanitary Vendors, Inc.* v. *Byrne,* 40 N.J. 157 (1963).

The committee therefore concludes that N.J.S. 2A:87-1 is capable of constitutional interpretation and, in fact, has been interpreted by the courts of our State. The committee further concludes that because of uncertainty which has arisen with respect to various factual situations the public is entitled to notice as to those circumstances which would subject a person to criminal prosecution under the abortion statute.

The committee very forcefully emphasizes that none of the situations, where it deals with the problems of "lawful justification," is one which is of the nature of the so-called "abortion mill", or "the backroom abortion".

The committee therefore recommends that N.J.S. 2A: 87-1 be interpreted to mean that a person is subject to criminal prosecution for causing or procuring an abortion except in those instances where such a technique is necessary for the preservation of the mother's life, or where a physician performs an abortion on the basis of a good faith determination which is made in accordance with the accepted medical standards that such an operation is medically indicated.

/s/ Brenden T. Byrne

/s/ Joseph A. Hoffman

/s/ Robert Frederick

/s/ Leo Kaplowitz

/s/ Frank Scerbo

Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, *Y.W.C.A.* v. *Kugler*, Civ. No. 264-70 and Civ. No. 431-70, April 7, 1972, pages 25-31

* * * * *

—25—

constitutional rights which are set forth in your opinion and the Attorney General is going to stand by his position of not being sure that he has to listen to your opinion, there is going to be a collision, and the question is where it is going to come and how, but it is going to come. I don't think there is much way of avoiding it, based on the position that has been taken.

Judge Forman: You think what you allege in these papers already amounts to bad faith on the part of the Attorney General; because you agree that bad faith is an essential element in any application of this sort.

Mr. Samuel: Yes.

Judge Forman: All right. That is it.

Mr. Evenchick: Your Honor, until approximately a week ago when I happened to have read in a newspaper about one Dr. Livingston, I had not heard of him. I don't know him. I have no knowledge of his activities beyond what I read in the newspaper that was attributed to him.

In any event, what I believe is occurring here is an effort by the plaintiffs, or at least an effort by Dr. Livingston to bait the State into doing just what this Court indi-

—26—

cated in its opinion it doubted the State or did not believe the State would do and what the State through the Attorney General indicated it has no intention of doing, and that is acting in bad faith.

For a doctor to hold a press conference and make certain statements in this particular instance, in my opinion, was deliberately designed to, as I indicate, bait the State into that kind of bad faith. This the State will not permit itself to be led into. As far as I know—and I represent to the Court there is no intention towards any, as it were, bad faith prosecutions.

Judge Garth: Any intention towards any prosecution?

Mr. Evenchick: Any prosecution whatsoever? There has been none that has arisen that I am aware of, and Dr. Livingston is not an exception to that.

Now, what Dr. Livingston may have done or was—

Judge Garth: Let me interrupt. Have you, or, I am sorry, has the Office of the Attorney General, as it has in the past when relevant circumstances have arisen in difficult context, has the Office of the Attorney General given instructions in any respect to any of the county prosecutors with respect to the presentation of information

—27—

for indictments against individuals such as Dr. Livingston who may have performed abortions since February 29, 1972?

Mr. Evenchick: The only instructions that have been given—well, the only statements and instructions that have been given are those, first the statement, the public statement of the Attorney General, which was issued shortly after this Court's opinion and a recommendation to the prosecutors that there be no, that pending prosecutions of doctors be held in abeyance, and those are the only instructions that have been given to my knowledge by the Attorney General.

If I may, so I am absolutely certain of what I am saying to the Court is accurate, I would like to return to counsel table for a moment.

My colleague, Deputy Attorney General Luciani, who is here with me today, agrees what I represented to the Court is accurate. The statement dated March 7, 1972 was made an appendix to my brief, and that represents the extent of any instructions or recommendations made to law enforcement officials. I believe that, indeed, there is no collision course at this moment between anyone and the State, and we ought not to create one, and that is what I am afraid Dr. Livingston is attempting to do. And if there is this delicate Federal-State balance that has been re-

ferred to, and indeed it is not a problem but it is a reality and one which will ultimately be resolved when this case is appealed, but that does not mean the mere fact this Court has spoken and that there may be conflicting opinions from the Supreme Court of New Jersey, it does not mean there is going to be a constitutional collision, and surely does not mean there is going to be any bad faith prosecution.

Judge Forman: All right.

Mr. Samuel: May I just add one further thing. I don't think Dr. Livingston is baiting anybody.

Judge Forman: Well, that doesn't need rebuttal. That is lawyer's rhetorical language, such as you yourself sometimes are guilty of.

Mr. Samuel: In the Attorney General's statement he said he did not think the Court intended to change anything. Two of the plaintiffs in this action were doctors who spent considerable amounts of time in jail. We think this Court did intend to change something.

Dr. Livingston performed two abortions, and the fact that such publicity was given to the fact that he announced that he performed two abortions indicated there was some question in people's minds as to whether or not in New

—29—

York, where they perform many more than two abortions a day, and you wouldn't get anyone to raise their eyebrows at somebody doing ten or fifteen a day, how many doctors are doing it; the fact about a fuss in New Jersey that two doctors are doing it indicates that doctors are chilled and deterred, and when the Deputy Attorney General in Bergen County says that we are going to present it before a Grand Jury, this is intended to intimidate, harass and chill.

Judge Garth: I would like to ask Mr. Evenchick one more question.

Do you have any views with respect to the procedural status of the plaintiffs of Dr. Livingston's application, first to intervene and, secondly, to be before a three-judge panel, as I guess he probably is? I didn't hear you address yourself to that.

Mr. Evenchick: I appreciate the opportunity to do so. I was about to request the opportunity of the Court. I realized I did not address myself to it.

On the question of intervention, I would heartedly oppose that application and point out to the Court if this individual is indeed a licensed, practicing physician of the State, as he purports to be, his rights in this matter are fully and amply protected by this Court's decision which, after all, is all about the rights of licensed, practicing phy-

—30—

sicians, and therefore at this late stage in this litigation there is no reason whatsoever for another licensed practic-

ing physician to be added to the list of those who are plaintiffs, and that is my position on the intervention aspect.

Insofar as this application to what I gather now from what Mr. Samuel said he is treating as his request as one made to a three-judge panel, to this three-judge panel, I really have nothing to add beyond what I have already said.

As to intervention, I have just received the papers he filed with this Court this morning, although I did have verbal notice he intended to make an ex parte application to a single judge of this panel. I believe that if there is to be an injunction, and really, I suppose, this order to show cause comes right down to an effort by plaintiffs now to get the injunction which this Court refused to issue.

It is my understanding of the Federal statute such injunction could come only from a three-judge Court.

Judge Barlow: It certainly couldn't come on an ex parte application.

Mr. Evenchick: I would agree with you, Judge Barlow.

—31—

Judge Garth: You say such injunction could only come from a three-judge Court. That is when it is allied with an application to declare a state statute unconstitutional. If we don't permit intervention, in effect the decision of this Court has been to declare the statute unconstitutional, so he is left, then, with just the one prong of what otherwise is normally a two-pronged attack, isn't that so?

Mr. Evenchick: Yes, your Honor.

Of course, there was in the pleadings in the plaintiffs' complaint request for injunctive relief, which was denied by this Court. I believe what plaintiffs seek to do now is to come back before you and say: your Honors opined there would be no bad faith. We believe there has been bad faith

since the time of your decision and therefore ask you to reconsider your decision as to the injunction. I believe that is what the application amounts to.

All I am saying to your Honors is that I am urging before your Honors there has been no bad faith. Nothing has happened since the time of your decision, or even before that, which would change the picture as it was when your Honors wrote the decision in this case and when—

Judge Garth: Are you saying, then, Mr. * * *

Letter Brief of Assistant Prosecutor Archibald Kreiger

(COPY)

PROSECUTOR OF CAMDEN COUNTY

June 15, 1973

Hon. William E. Peel, J.C.C.
Court House
Camden, N.J.

Re: STATE vs. WARREN H. SLOUGH
Ind. Nos. 447-65 & 448-65

PETITION FOR POST-CONVICTION RELIEF

Dear Judge Peel:

We have reviewed the brief of defendant-petitioner in this case in which the claim is made that our abortion statute is invalid, under the recent decisions of the Supreme Court of the United States, that he likewise would be entitled to the same immunity because he *assisted* a licensed physician at the time of the event, because the entire statute was stricken down.

We submit that this argument is untenable because the defendant was not a registered nurse or a practical nurse, who are the only persons qualified and who have been registered under our statute to perform any services in assisting a licensed physician in connection with any surgery or operation. N.J.S. 45:11-1, et seq.

This question as to assistants was not decided by the Supreme Court, and we believe that our statute is only in-

valid as to physicians and registered nurses and hence severable as to other persons.

As sentimental as the defendant's brief sounds by referring to him, that even though he was not a licensed physician who was assisting one, "it would be the height of absurdity to say that while the doctor who performed the abortion could not be punished, the assistant who worked under his direction may be jailed. Our jurisprudence cannot allow a man to be incarcerated for assisting in the performance of a lawful act," is not a valid argument under our statute as construed by our courts but is severable as to this defendant.

This argument would be a valid one if the "assistant" was a registered nurse or a practical nurse, but the fact remains that the defendant was neither, and his claim now as to assisting, in and by itself constitutes a violation of the act relating to our abortion act.

We submit that the defendant's argument claiming to be an assistant to a licensed physician to entitle him to the benefit of the invalidity of our statute as decided by the Supreme Court of the United States, has no application to this case, and consequently his petition for post-conviction relief should be dismissed.

Very truly yours,

ARCHIBALD KREIGER
Assistant Prosecutor

AK:jls

cc—Peter S. Buchsbaum, Esq.
45 Academy Street
Newark, N.J. 07102

Letter of Attorney General William F. Hyland to the United States Court of Appeals for the Third Circuit

(Emblem)

STATE OF NEW JERSEY
WILLIAM F. HYLAND
ATTORNEY GENERAL

February 15, 1974

Hon. Francis L. Van Dusen
U.S. Court of Appeals for the Third Circuit
2046 U.S. Court House
9th and Chestnut Streets
Philadelphia, Pennsylvania 19107

Hon. Arlin M. Adams
U.S. Court of Appeals for the Third Circuit
2046 U.S. Court House
9th and Chestnut Streets
Philadelphia, Pennsylvania 19107

Hon. Daniel H. Huyett, III
U.S. District Court Judge
3006 U.S. Court House
9th and Market Streets
Philadelphia, Pennsylvania 19107

Re: *Y.W.C.A. et al* v. *Kugler*—No. 73-1837

Honorable Sirs:

Pursuant to the Court's request on oral argument of the above entitled matter, herein submitted are the views of the Attorney General of New Jersey regarding the appli-

cation of the State's criminal abortion statute (N.J.S.A. 2A:87-1).

In the wake of the United States Supreme Court's decisions in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), this office has redefined the application of N.J.S.A. 2A:87-1 pursuant to the authority of N.J.S.A. 52:17B-97 *et seq.* The provision has been interpreted, in accordance with the decision in *State* v. *Haren,* 124 N.J. Super 475, 480, 307 A2d 644, 647 (L. Div. 1973), to apply only to lay persons not acting under the supervision of a duly licensed medical doctor. The particular codification of the aider and abettor concept within the statute is similarly limited in application. Therefore, physicians licensed to practice medicine in this State, and any lay person acting under the supervision of a licensed practitioner, are beyond the purview of the proscription. Interpreted in this manner, N.J.S.A. 2A:87-1 is constitutional as applied to lay persons.

It is hoped that the foregoing response satisfies your inquiry.

Respectfully,

/s/ William F. Hyland
William F. Hyland
Attorney General of New Jersey

WFH:AJL:cm

cc: Nadine Taub, Esq.